In the Supreme Court of the United States

OCTOBER TERM—1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.

No. [redacted] 10

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.

No. 122 11

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

INDEX.

TABLE OF AUTHORITIES.

Cases.

Statutes.

TABLE OF ABBREVIATIONS.

For convenience we shall use the abbreviations employed in the petitions and also the following:

Bill	Bill of Complaint.
Bonds	The First Consolidated Mortgage 5% Gold Bonds of The Indianapolis Gas Company issued under the Mortgage.
DX	Exhibit offered by defendants City of Indianapolis, *et al.*, during trial.
DX Stip.	Stipulation Exhibit offered by defendants City of Indianapolis, *et al.*, during trial.
Lease	The Lease of September 30, 1913, from Indianapolis Gas to Citizens Gas (Exhibit B to Bill, I R. 51-80).
Mortgage	Indenture of Mortgage from Indianapolis Gas to Chase's predecessors dated October 1, 1902 (Exhibit A to Bill, I R. 23-51).
PX	Exhibit offered by plaintiff during trial.
PX Stip.	Stipulation Exhibit offered by plaintiff during trial.
Pet.	Petitions for writ of certiorari and briefs in support thereof filed by the City of Indianapolis, *et al.**
.... R.	Printed transcript of the record.
Stip.	Subdivision of Stipulation of Facts (PX 1, II R. 616-639, offered II R. 326-7).

* The City's petition and brief in Cause No. 421 is substantially identical with its petition and brief in Cause No. 422 and references to either petition and brief are equally applicable to the other.

In the Supreme Court of the United States

OCTOBER TERM—1940.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.
No. 421.

CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee, etc., *et al.*,
Respondents.
No. 422.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

Separate appeals (Nos. 7143, 7144) from the single decision of the trial court were heard together by the Circuit Court of Appeals on the same record. The City has filed separate petitions for a writ of certiorari (causes 421 and 422) with respect to each appeal. Since these two petitions and the supporting briefs are substantially identical, plaintiff is filing this one brief in opposition to each of the City's petitions.

The decision of the Circuit Court of Appeals (IV R. 1281-1306) is reported in 113 F. (2d) 217.

STATEMENT OF FACTS.

The absence of any adequate Statement of Facts in the petitions requires a brief statement of the undisputed facts upon which the Circuit Court of Appeals based its opinion.

In 1902 Indianapolis Gas gave an open mortgage upon its plant and property to one of Chase's corporate predecessors to secure an authorized bond issue of $7,500,000. (Bill, Exhibit A, I R. 23, offered, II R. 327.) In 1913 Indianapolis Gas leased its property to Citizens Gas, as lessee, for 99 years, the lessee agreeing to pay, as part of the rental, the interest on the outstanding mortgage Bonds of Indianapolis Gas and on any additional Bonds which might subsequently be issued. (Bill, Exhibit B, I R. 51, offered, II R. 327.) Citizens Gas paid the interest on the Bonds from 1913 to 1935 (II R. 627, Stip. par. 11(a)), and sold additional Bonds (about $2,000,000) to the public on representations that it had a 99 year lease on the property and had agreed to pay the interest on the Bonds as part of the rental. (II R. 627, Stip. par. 10(a); II R. 573, 592-605; III R. 899-922.) Citizens Gas was the trustee of a Public Charitable Trust for the benefit of the inhabitants of the City of Indianapolis. On September 9, 1935, it conveyed all of its property, including the Lease in question, to the City, as successor trustee, the entire consideration being paid to the bondholders and stockholders of Citizens Gas, leaving it without assets. (II R. 634-5, Stip. pars. 16-17.)

The City *accepted and recorded* the various instruments of transfer, *including an assignment of the Lease*, went into possession of the Citizens Gas property, *including the leased property*, and has operated all of said property and received the revenues therefrom continuously since September 9, 1935. (II R. 330, 350, 467-8; II R. 622-3, Stip. par. 6(c).) The statement made in the petitions (p. 9) that the City rejected the assignment of the Lease tendered by Citizens Gas has no support in the record.

except the single fact that the City—at about the time when it accepted the assignment of the Lease from Citizens Gas, had the assignment recorded, and took possession of the leased property—adopted an *ex parte* resolution *saying* that it refused to accept the assignment. The petitioners' statement (Pet. 9) that Indianapolis Gas consented to the City's taking possession of and operating the property is wholly unsupported by the record. The City received no communication of any sort from Indianapolis Gas until September 30, 1935 (PX Stip. 66, III R. 838, offered, II R. 329), three weeks after it had taken possession of the leased property, and there was no agreement concerning the City's *use of the property* until March 2, 1936. (DX Stip. 64, 65, III R. 968-9, offered, II R. 433-4; DX B, III R. 981, offered, II R. 386.) Thus, the City had no right to take possession of the leased property on September 9, 1935, except as assignee of the Lease.

The City provided for the payment of the Bond interest due on October 1, 1935, and on April 1, 1936, but no interest has been paid since April 1, 1936.

The respondent, Chase, brought this action in the District Court of the United States for the Southern District of Indiana, suing as Trustee under the Indianapolis Gas mortgage and joining Indianapolis Gas, Citizens Gas, and the City as defendants. All of the defendants were citizens of Indiana and federal jurisdiction was based on diversity of citizenship. Chase sought to recover judgment for the overdue interest on the Bonds, with interest on unpaid interest, against all the defendants and against the property once owned by Citizens Gas and transferred by it to the City. Plaintiff also sought a declaratory judgment to establish that the Lease from Indianapolis Gas to Citizens Gas was and is binding on all the defendants and on the property transferred to the City by Citizens Gas.

The District Court originally held that Indianapolis Gas should be realigned with plaintiff and dismissed the

case for want of jurisdiction (I R. 271). The Circuit Court of Appeals reversed this decision and remanded the case for trial. (II R. 285-92; 96 F. (2d) 363.) This Court denied certiorari. (305 U. S. 600.) On the trial the District Court denied plaintiff any relief except a judgment against Indianapolis Gas alone in the amount of the unpaid coupons. ($1,032,150.00, See III R. 1193.)

Separate appeals were taken by plaintiff and Indianapolis Gas to the Circuit Court of Appeals for the Seventh Circuit. These two causes, Nos. 7143 and 7144, were heard together on the same record. The Circuit Court of Appeals reversed the judgment of the District Court and held (IV R. 1306):

> (I) That Chase is entitled to a coercive judgment for the overdue interest, with interest on overdue interest at 5%, against "(1) the City as successor trustee and the trust property; (2) Citizens Gas; and (3) Indianapolis Gas." (The amount due is now about $1,700,000.)
>
> (II) That "Chase is entitled to a declaratory judgment to the effect that the lease is valid and enforceable against the parties * * *."

The City has filed two petitions for certiorari (Nos. 421 and 422). Chase has filed a cross-petition for writs of certiorari (Nos. 423 and 424), asking that writs be granted on its cross-petition only in the event that the City's petitions are granted.

ARGUMENT

We shall discuss briefly the City's four reasons for the allowance of a writ to show

> (1) that no questions warranting the exercise of this Court's extraordinary jurisdiction are presented, and
>
> (2) that the decision below is obviously sound upon universally accepted principles.

I. The City's So-called "Constitutional" Question Is Obviously Fanciful.

The City's answer and counter-claim asserted that the City was entitled to reject the assignment of the Lease because the rent was excessive and the Lease burdensome. (I R. 181, 186.) Chase moved to strike these allegations from the City's pleading (II R. 317); the District Court overruled that motion (II R. 320), but directed that the taking of evidence in support of that defense should be deferred.* (II R. 321-2.) Chase's first two assignments of error (Statement of Points) on appeal were addressed to the District Court's failure to strike out this immaterial matter. (III R. 1196.) This error was fully briefed and argued before the Court of Appeals without any suggestion from the City that a constitutional question was involved.

The Court of Appeals came to the conclusion, *as a matter of law*, that the City's allegations of "burdensomeness" presented no defense, and therefore directed final judgment without permitting the City an opportunity to prove something which would be wholly immaterial even if it were proved. The City claims that unless it has an opportunity to prove these wholly immaterial allegations, its constitutional rights have been violated.

The City never asserted any rights under the Fourteenth Amendment until its first Petition for Rehearing. (IV R. 1310.) It is clear that the Court's action not being that of a state the Fourteenth Amendment has no application.

> *Jones v. Buffalo Creek Coal & Coke Co.*, 245 U. S. 328, 329 (1917, Brandeis, *J.*).

* While Chase did not object to this order (Pet. 11, 21, 25), it has consistently maintained that the allegations of burdensomeness presented no valid defense and that no evidence to support them should be received. (e.g. IV R. 1331-2.) Under this order several claims on which Chase relied are still to be tried (e.g., failure to maintain the leased property, recovery of fees and expenses, etc.), but they do not affect the determination of the validity of the Lease.

The City never asserted any rights under the Fifth Amendment until its Second Petition for Rehearing. (cf. IV R. 1310 and IV R. 1346.) The substance of its contention in this respect is that the action of the Appellate Court in deciding, *as a matter of law*, that the defense of "burdensomeness" is wholly ineffectual and in denying the City a right to prove such immaterial allegations amounts to a lack of due process. There is no substance in such a contention. It is the universal practice for a trial court or an appellate court, in sustaining a demurrer, a motion to strike, or other similar attacks upon a particular defense to refuse to allow a party to prove facts which would constitute no defense if they were proved. Any other rule would hopelessly encumber the courts in the trial of cases. The right to prove facts which would constitute no defense if proved cannot be an element of due process.

It should also be noted that the issue reserved by the District Court was merely whether the City "had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome." (II R. 322.) Since, as the Court of Appeals held (IV R. 1292, 1300-01), the City did not "refuse and reject an assignment of such lease," there was no occasion to receive evidence on the question whether the City had a right which it did not exercise.

The City had ample opportunity in *both* lower courts to present its views as to the validity of the defense of burdensomeness. Moreover, the requirements of due process of law would have been fully satisfied even if the City had had no hearing on this question in the *District* Court. *American Surety Co. v. Baldwin*, 287 U. S. 156, 168 (Brandeis, *J.*, 1932). This is especially true in a federal equity case in which the Court of Appeals hears the case *de novo* and has full power to adjudicate all issues of law and fact.

Alexander v. Redmond, 180 Fed. 92, 93, 96 (C. C. A. 2nd, 1910);

Unkle v. Wills, 281 Fed. 29, 34 (C. C. A. 8th, 1922).

The cases on which the City relies (Pet. 14, 23-25)—holding that due process of law necessitates a judicial review "as to both law and facts" (not necessarily by a *trial* court)—are not germane to the question here presented.

The record discloses ample reasons why the decision of the Court of Appeals—that the alleged burdensomeness is no defense—is sound.

(1) When the Lease was made in 1913 it was expressly approved by the Public Service Commission of Indiana as being in the public interest. (Bill, Exhibit D, I R. 116, offered I R. 327.) The City was a party to the proceedings before the Commission and the Lease was made, to use the City's own language, "with the full consent and approval of the City of Indianapolis." (PX 89, III R. 847, 859, offered II R. 334.) It is the settled law of Indiana that the determination of the Public Service Commission —that the Lease was in the public interest, hence not burdensome—is binding upon all the world and cannot be *collaterally* attacked.

Public Service Commission v. Indianapolis, 193 Ind. 37, 43; 137 N. E. 705, 707 (1922).

(2) In 1930 Williams, suing as a beneficiary of the Public Charitable Trust, brought suit to set aside the Lease as a burden and cloud upon the trust. (PX Stip. 35, II R. 762, 770, 780, offered II R. 328.) All of the parties to the present case were joined as defendants by Williams. (II R. 761-4.) In that case the Supreme Court of Indiana held, among other things, that Citizens Gas and Indianapolis Gas had power to execute the Lease in question, that the action of the Public Service Commission in approving the

Lease was valid, and that the Lease could not be set aside on the ground that it was burdensome.

Williams v. Citizens' Gas Co., 206 Ind. 448; 188 N. E. 212, 215-16 (1934).

See also opinion below, IV R. 1290, footnote 5.

This decision of the Indiana Supreme Court was binding upon the court below as to the validity of the Lease because it was (1) a final adjudication between the parties, and (2) an authoritative statement of the law of Indiana, which was binding in the federal courts under the rule of *Erie Railroad v. Tompkins*, 304 U. S. 64 (1938).

(3) Under the law, which is clearly established in Indiana as elsewhere, neither a party to nor an assignee of a contract or lease can escape its obligations by showing that they either were originally or have become burdensome. This rule is peculiarly applicable where the Lease, as in this case, was made "with the full consent and approval of the City of Indianapolis."

Hamilton v. Hamilton, 162 Ind. 430; 70 N. E. 535, 537 (1904);

Warner v. Marshall, 166 Ind. 88; 75 N. E. 582, 592 (1905);

Indianapolis v. Indianapolis Gas-Light & Coke Co., 66 Ind. 396, 407 (1879);

Terre Haute v. Terre Haute Waterworks Co., 94 Ind. 305, 307 (1884).

Thus the Circuit Court of Appeals was obviously right in holding that the City's allegations of burdensomeness presented no valid defense. Certainly no constitutional rights of the City were violated when the court refused to allow it to prove facts which would constitute no defense.

II. The Circuit Court of Appeals Properly Refused to Re-Align Indianapolis Gas with Chase as a Party Plaintiff.

The City contends that Indianapolis Gas should be re-aligned with Chase as a party plaintiff. The District Court rendered a coercive judgment for Chase against Indianapolis Gas alone for $1,032,150. (III R. 1193.) The City did not appeal from that decision of the District Court; it was content with federal jurisdiction as long as the decision on the merits was in its favor. The decision of the Court of Appeals requires a coercive judgment *against Indianapolis Gas* for about $1,700,000.

Is it possible that a party against whom plaintiff is entitled to a judgment of this kind should be aligned *with* the plaintiff? The suggestion answers itself.

Petitioners' argument is based wholly upon the fact that the City, as successor trustee, has been found primarily and Indianapolis Gas secondarily (or tertiarily) liable, and that the City as trustee can pay the judgment. A parity of reasoning would require a re-alignment whenever a creditor sues a principal and a surety on a debt.

The proposition of law stated by the Court of Appeals on the first appeal (II R. 291-2)—that a defendant against whom plaintiff asks specific relief and with whom plaintiff has distinct conflicts of interest should not be re-aligned with plaintiff in determining federal jurisdiction—has been universally recognized by this Court and other federal courts.

Petitioners' counsel fail to cite a single case from any court in which a defendant was re-aligned with the plaintiff for jurisdictional purposes where a single substantial controversy between plaintiff and such defendant was presented by the bill. On the other hand, the decisions of this Court and the several Circuit Courts of Appeals unanimously support the proposition that there will be no re-alignment if there is a single substantial controversy between plaintiff and the defendant sought to be re-aligned.

Sutton v. English, 246 U. S. 199, 204 (1918);

Republic National Bank & Trust Co. v. Massachusetts Bonding and Insurance Co., 68 F. (2d) 445, 447 (C. C. A. 5th, 1934);

Detroit Tile & Mosaic Co. v. Mason Contractors' Association, 48 F. (2d) 729 (C. C. A. 6th, 1931);

Franz v. Franz, 15 F. (2d) 797, 799 (C. C. A. 8th, 1926);

Feidler v. Bartleson, 161 Fed. 30, 35 (C. C. A. 9th, 1908).

The federal courts have continued to apply this rule since the decision of the jurisdictional question in this case in 1938, relying upon the cases just cited and the decision of the Court of Appeals in this case. See *Rex Co. v. International Harvester Co.*, 107 F. (2d) 767, 768 (C. C. A. 5th, 1939).

We submit that the decision of the Circuit Court of Appeals sustaining jurisdiction, as to which this Court has previously denied certiorari (305 U. S. 600), accords with the settled law and presents no question requiring examination by this Court.

III. The Rule of Erie Railroad v. Tompkins Required the Decision Made by the Court of Appeals and There Was No Departure from that Rule.

The rule of *Erie Railroad v. Tompkins*, 304 U. S. 64, compelled the result reached by the Circuit Court of Appeals. Every Indiana decision bearing upon the validity of the Lease compels the conclusion that it is valid. The City's present contentions as to the validity of the Lease were all conclusively negatived, *as a matter of Indiana law*, in *Williams v. Citizens' Gas Co.*, 206 Ind. 448; 188 N. E. 212 (1934). Entirely aside from the question of *res judicata*, that decision conclusively established the law of Indiana which the Court of Appeals was bound to follow.

Let us examine briefly the respects in which the Court of Appeals is supposed to have disregarded the Indiana law.

(1) *Estoppel against the City.* (Pet. 12, 15, 29.) The Court of Appeals made no decision on the question of estoppel *in pais*, although it would have been fully warranted in doing so. In both its first and its second Petitions for Rehearing the City admitted, as to any claimed estoppel of the City, that "there is no express holding to that effect." (IV R. 1313, line 17; IV R. 1351, line 1.) The court can hardly have disregarded the Indiana law on a question as to which it made no express holding.

(2) *Res Judicata.* (Pet. 12, 15, 30.) The decision of the Court of Appeals was based primarily upon its independent conclusion that the Lease is valid. The court did state, however, "in passing," that certain cases "are determinative of the immediate issue here, *i.e.*, as to the validity of the 99 years lease." (IV R. 1390; 113 F. (2d) 217, 229.)

It is not clear whether the court regarded the cases referred to as "determinative" on the ground of *res judicata* or on the ground that they established the Indiana law on the subject. Each of them was important in establishing the Indiana law, and at least one of them was plainly binding as *res judicata*. For example, in the *Williams* case the Supreme Court of Indiana determined, *as to the very Lease here in question*, in a case in which all the parties now before the court were joined, that the Lease was valid and a part of the trust estate.

(3) *Construction of Municipal Grants.* (Pet. 13, 15, 30.) The construction of the franchise contract here in question is largely a question of fact peculiar to this case and presents no question of general importance. However, it is interesting to observe that the result reached by the Court of Appeals in holding that Citizens Gas had the power to make this 99 year Lease is in complete agreement

with the decision of the Public Service Commission in 1913, the decision in *Fishback v. Public Service Commission*, 193 Ind. 282, 138 N. E. 346 (1923), the decision of the Supreme Court of Indiana in *Williams v. Citizens' Gas Co.*, 206 Ind. 448, 188 N. E. 212, 215-16 (1934), and the uniform practical construction of the franchise contract by Citizens Gas and the City over a period of 22 years. Moreover, the power to make the Lease in question was *specifically conferred* by § 95½ of the Shively-Spencer Act of 1913.*

(4) *The alleged statutory prohibitions.* (Pet. 13, 16, 31.) The City has express power to receive trusts "and to agree to conditions and terms accompanying the same" (Burns Indiana Statutes, 1933, § 48-1407**) and this power is not subject to the statutes on which the City relies. Beyond that, the "validating acts" of 1929† gave the City express power to take over all the Citizens Gas property, including the Lease.

The frequently repeated assertion that "the lease had no municipal sanction" (Pet. 7, 13, 16, 31) is wholly immaterial if it refers to the execution of the Lease in 1913 and is contrary to the facts if it refers to the City's assumption of the obligations under the Lease. Both the Board of Directors for Utilities and the City Council took appropriate action to take over the Public Charitable Trust, which included the Lease in question. (II R. 330, 350, 467-8; DX 8, III R. 1018-19, offered, II R. 429.) This necessarily involved the assumption of the lessee's obligations under the Lease.

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* This section is quoted in full in Appendix A to this brief, *infra*, p. 15.

** The pertinent portions of this section are quoted in Appendix B to this brief, *infra*, p. 16.

† The pertinent portions of these acts are quoted in Appendix C to this brief, *infra*, p. 17. As admitted by the City in the *Todd* case and pointed out by the Court of Appeals (IV R. 1288, note 3), the "validating acts" of 1929 were passed to remove any doubt as to the City's authority to take over the Citizens Gas property, including the Lease here in question.

It is clear that in upholding the validity of the Lease the Court of Appeals followed the controlling Indiana decisions and thereby conformed to the rule laid down by this Court in *Erie Railroad v. Tompkins*.

IV. The Judgment Ordered by the Court of Appeals Binds the City as Successor Trustee and the Trust Property but Imposes no Burden on Revenues Raised by Taxation.

The statement repeatedly made throughout the petitions that the judgment directed by the Circuit Court of Appeals "presumably imposes the burden on revenues raised by taxation" (Pet. 13, 16, 31) is wholly unsupported by the record. Both the opinion and order of the Court of Appeals make it clear that the City is liable under the Lease *as successor trustee only*, which means that its liability is limited to the trust property (including the leasehold of the Indianapolis Gas property) and the revenues from the trust property. Thus the decrees of the Circuit Court of Appeals (IV R. 1307-8) direct the District Court to enter a declaratory judgment "to the effect that the lease is valid and enforceable against the parties in the following order of liability:

> "(1) The City as Successor Trustee and the Trust Property; * * *."

Similarly, the coercive judgment for the overdue interest is to be "enforceable against the parties in the following order of liability:

> "(1) The City as Successor Trustee and the Trust Property; * * *."

The City raised this same question in its Petition for Rehearing (IV R. 1312-13) and to avoid any possible question on this point the Court of Appeals amended its opinion by inserting the words "as successor trustee" in the one place in its opinion where it had omitted such language in directing the judgment. (Compare IV R. 1306, line 34, and IV R. 1335.)

Both the opinion and order of the Court of Appeals make it abundantly clear that the coercive judgment and the declaratory judgment will bind the City in its capacity as successor trustee only and the trust property.

CONCLUSION.

The federal questions raised by the City are clearly without substance and present no reason for granting a writ of certiorari. As to the questions of Indiana law, the decision of the Circuit Court of Appeals sustaining the validity of the Lease is in complete accord with the applicable law of Indiana. In fact, the Indiana law directly in point was established by the *Williams** case, in which the Supreme Court of Indiana held that the Lease was valid and binding on the Public Charitable Trust. Obviously, this attempt by the City to have this Court overrule the *Williams* case is contrary to rather than in support of *Erie Railroad v. Tompkins.*

We submit that the decision of the Circuit Court of Appeals sustaining the validity of the Lease is clearly correct and that this case presents no ground for the exercise of this Court's discretionary power to grant a writ of certiorari.

Respectfully submitted,

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October 2nd, 1940.

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* *Williams v. Citizens' Gas Co.*, 206 Ind. 448.

APPENDIX A.

Section 95½ of the Shively-Spencer Act.

CHAPTER 76—LAWS OF INDIANA OF 1913.
(pp. 199-200.)

[*H. 361. Approved March 4, 1913.*]

* * * * *

Joint Service—Requirements.

SEC. 95½. That with the consent and approval of the commission but not otherwise, any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state may be merged and may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other; and any public utility may also, with the consent of the holders of three-fourths of the capital stock outstanding, purchase or lease the property, plant or business or any part thereof of any other such public utility at a price and on terms fixed by the commission. Any such public utility may, with the consent of three-fourths of the holders of the outstanding stock, sell or lease its property or business or any part thereof to any other such public utility at a price and on terms fixed by the commission upon paying in cash to non-consenting stockholders the appraised value of their stock as fixed by the commission.

APPENDIX B.

Excerpt from Chapter 129 of Laws of Indiana of 1905 (pp. 246-7).

* * * * *

SEC. 53. The common council of every city shall have power to enact ordinances for the following purposes:

* * *

Sixth. To receive gifts, donations, bequests and public trusts and to agree to conditions and terms accompanying the same and bind the corporation to carry them out. [Burns Indiana Statutes, 1933, § 48-1407.]

APPENDIX C.

Excerpts from Chapters 77 and 78 of Laws of Indiana of 1929.

CHAPTER 77—LAWS OF 1929.
(pp. 252, 257, 259-260.)

AN ACT supplemental to an act entitled "An act concerning municipal corporations," approved March 6, 1905.

[*H. 132. Approved March 11, 1929.*]

First Class Cities, Utilities Department.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana*, First Class Cities, Utilities Department. In addition to the existing executive departments of cities of the first class, as such cities are defined in an act entitled "An act concerning municipal corporations," approved March 6, 1905, and acts amendatory thereof, there is hereby created in any such city having a population of not less than three hundred thousand (300,000), as shown by the last preceding United States census, a department of public utilities, which shall be under the control of a board of seven (7) members, to be known as the "board of directors for utilities," to be appointed annually by the board herein provided for and designated as the board of trustees for utilities.

* * * * *

Powers and Duties of the Board of Directors.

SEC. 3. Powers and Duties of the Board of Directors. The said board of directors for utilities shall have the exclusive government, management, regulation and control of any water works, gas works, electric light works, heating and power plants, and all property relating thereto, which any such city may heretofore have acquired or may hereafter acquire or construct for the service of the public as consumers, and such board of directors shall be charged with the duty of and shall have all necessary power to make all necessary repairs, renewals, enlargements, extensions or additions to any such plant or property which in the judgment of said board of directors is desirable or necessary for the proper serving of the inhabitants of said city and the adjacent community served with respect to

any such utility from any such plant or plants. In connection with the duties devolving upon such board of directors as aforesaid, it shall have power as follows:

* * * * *

(7) To take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition of any utility by any such city, and to take any and all steps necessary to perform and fulfill the terms of any such lease, and to obtain and preserve the benefits therefrom; and in event there be any outstanding open mortgage upon the property covered by any such lease so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and betterments to such leased property; and, subject to the approval of the public service commission of Indiana, to sell any such bonds so taken down for the purpose of assisting in defraying the costs of any such extensions or betterments to such leased property.

* * * * *

CHAPTER 78—LAWS OF 1929.

(Printed in full.)

(pp. 268-271.)

AN ACT relating to corporations organized before May 1, 1913, for the purpose of furnishing gas for fuel or illuminating purposes, or electric lights or water, or light, heat and power to any town or city or the citizens or inhabitants thereof, and the articles of incorporation of which provide for the transfer of the property of such corporation to such town or city, legalizing certain provisions in the articles of incorporation thereof and authorizing the conveyance of the property of such corporations to such towns or cities and authorizing such towns or cities to accept such conveyance, repealing all laws in conflict therewith and declaring an emergency.

[*H. 133. Approved March 11, 1929.*]

Gas Corporations, Certain—Conveyance of Property to Municipality—Retirement of Stock.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana*, That if in the original articles of incorporation of any corporation organized under the laws of this state prior to May 1st, 1913 (that being the date of the creation of the public service commission of this state), for the purpose of furnishing natural or artificial gas for fuel or for illuminating purposes, or for furnishing electric lights or water to the citizens of any town or city within this state, or to furnish light, heat and power to any town or city, or the inhabitants thereof, provision is made for the transfer or conveyance of the property of such corporation to such town or city, subject to the outstanding legal obligations of said corporation, whenever the holders or owners of shares of stock, stock certificates or holders or owners of any beneficial interest in such capital stock shall have received the face or par value of such shares of stock, stock certificates or beneficial interest, together with the interest or dividends thereon provided for in such articles of incorporation, such provision in such articles shall be, and is hereby legalized and declared to be valid and binding upon such corporation and upon the holders and owners of any such shares of stock, stock certificates or beneficial interest

therein or their assigns, and said town or city shall be authorized and entitled to accept a transfer and conveyance of any such property in accordance with the terms and conditions of such articles of incorporation, without the question of the acceptance or acquisition of such property being submitted to a vote of the electors of such town or city and without any election being held therein to determine whether such property shall be acquired by such town or city. It shall not be necessary to obtain the consent or approval of the public service commission of Indiana or any other state board, commission or officer for such transfer and conveyance or of the terms and conditions upon which the same is to be made, but such transfer and conveyance shall be valid without any order or approval of such commission, board or officer, and any provisions in such articles authorizing the board of directors, trustees or other officers of said corporation to issue bonds or to mortgage or otherwise encumber such property before such transfer and conveyance for the purpose of borrowing money with which to pay to such holders or owners of such shares of stock, stock certificates or owners of such beneficial interest thereof the face or par value of such shares of stock, stock certificates, together with the interest or dividends provided for in such articles, and authorizing such directors, trustees or other officers to transfer or convey the property of such corporation to such town or city whenever the holders or owners of the shares of stock, stock certificates or any beneficial interest therein have been paid the par or face value of such shares of stock or stock certificates together with the interest or dividends provided for, are hereby legalized and declared to be valid and binding and such directors, trustees or other officers of such corporation shall have the right and power to carry out and perform any such provisions in accordance with the terms of such articles. This act shall apply to any such corporation if organized before May 1, 1913, and in which the aforesaid provisions are contained in the articles of incorporation and which articles have thereafter been amended and in which such amended articles of incorporation such provisions are contained.

Any provisions in either the original articles of incorporation of any such corporation, or in any amendment

thereof, providing for the retirement of the outstanding preferred stock of such corporation before such conveyance is made to any such municipal corporation are hereby legalized and declared valid and binding and said corporation and the officers thereof are authorized to retire such stock in accordance with such provisions and the terms of such preferred stock, and to mortgage such property to secure funds with which to redeem such preferred stock and to pay the holders and owners of the shares of common stock or common stock certificates or of any beneficial interest therein the amounts provided for in such articles, and whenever the outstanding preferred stock in any such corporation shall have been redeemed and the holders and owners of such common stock, common stock certificates or of any beneficial interest therein shall have received the amounts therein provided for in such articles of incorporation, then the property of such corporation shall be conveyed to such municipal corporation in accordance with the provisions of such articles or amended articles of incorporation.

Whenever any instrument of transfer or conveyance shall be executed, transferring or conveying the property, either real or personal, of any such corporation to such town or city the title to such property shall vest in such town or city, subject to all outstanding legal obligations of said corporation: *Provided, however*, That such town or city shall not be liable for any such obligations and the same shall not constitute a debt of such town or city, but all such obligations shall be a charge upon said property so conveyed, and any mortgage or other lien or encumbrance executed by the board of directors, trustees or other authorized officers of such corporation before such transfer shall continue to be a lien on such property to the same extent as before such transfer or conveyance.

Said municipal corporation shall be authorized to accept, hold and own all the property of such corporation so transferred to it, including that located within this state and that located in any other state and any shares of stock or other interest in any other corporation of which said corporation making such transfer shall be the owner, and any right, title or interest such transferring corporation may have in any lease upon other property.

Provided, however, That if in any such municipal corporation there is now or is hereafter created or existing a separate taxing unit or district which shall be subject to taxation to raise money with which to either retire or redeem the stock of any such transferring corporation, or to pay obligations incurred for the benefit of such property, then all such property so transferred to such municipal corporation shall be held thereby in trust for the use and benefit of such separate taxing unit or district, and for the general public.

Repeal.

SEC. 2. That all laws and parts of laws in conflict herewith are hereby repealed.

Emergency.

SEC. 3. An emergency existing for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.